



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Parts 801, 802, 803, 812, 814, 822, and 852

RIN 2900-AP50

Revise and Streamline VA Acquisition Regulation to Adhere to Federal Acquisition Regulation Principles (VAAR Case 2014-V001)

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend and update its VA Acquisition Regulation (VAAR). Under this initiative all parts of the regulation are being reviewed in phased increments to revise or remove any policy that has been superseded by changes in the Federal Acquisition Regulation (FAR), to remove any procedural guidance that is internal to the VA, and to incorporate any new regulations or policies

Acquisition regulations become outdated over time and require updating to incorporate additional policies, solicitation provisions, or contract clauses that implement and supplement the FAR to satisfy VA mission needs, and to incorporate changes in dollar and approval thresholds, definitions, and VA position titles and offices. This Proposed Rule will correct inconsistencies, remove redundant and duplicate material already covered by the FAR, delete outdated material or information, and appropriately renumber VAAR text, clauses and provisions where required to comport with FAR format, numbering and arrangement.

This Proposed Rule will streamline the VAAR to implement and supplement the FAR only when required, and remove internal agency guidance as noted above in keeping with the FAR principles concerning agency acquisition regulations.

DATES: Comments must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER] to be considered in the formulation of the final rule.

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AP50 – Revise and Streamline VA Acquisition Regulation to Adhere to Federal Acquisition Regulation Principles (VAAR Case 2014-V001 – parts 801, 802, 803, 812, 814, 822, and 852).” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. This is not a toll-free number. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Ricky L. Clark, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street, NW, Washington DC 20001, (202) 632-5276. This is not a toll-free telephone number.

SUPPLEMENTARY INFORMATION:

Background

This action is being taken under the authority of the Office of Federal Procurement Policy Act which provides the authority for an agency head to authorize the issuance of agency acquisition regulations that implement or supplement the FAR. This authority ensures that Government procurements are handled fairly and consistently, that the Government receives overall best value, and that the Government and contractors both operate under a known set of rules.

The Proposed Rule updates the VAAR to current FAR titles, requirements, and definitions; it updates VA titles and offices; it corrects inconsistencies, removes redundancies and duplicate material already covered by the FAR; it deletes outdated material or information and appropriately renumbers VAAR text and clauses and provisions where required to comport with FAR format, numbering and arrangement. All amendments, revisions, and removals have been peer reviewed and concurred with by an Integrated Product Team of agency stakeholders.

The VAAR uses the regulatory structure and arrangement of the FAR and headings and subject areas are broken up consistent with the FAR content. The VAAR is divided into subchapters, parts (each of which covers a separate aspect of acquisition), subparts, sections, and subsections.

The Office of Federal Procurement Policy Act provides the authority for the Federal Acquisition Regulation and for the issuance of Agency Acquisition regulations consistent with the FAR.

When Federal agencies acquire supplies and services using appropriated funds, the purchase is governed by the FAR, set forth at Title 48 Code of Federal Regulations (CFR), chapter 1, parts 1 through 53, and the agency regulations that implement and supplement the FAR. The VAAR is set forth at Title 48 CFR, chapter 8, parts 801 to 873. These authorities are designed to ensure that Government procurements are handled fairly and consistently, that the Government receives overall best value, and that the Government and contractors both operate under a known set of rules.

VA is proposing to revise the VAAR to add new policy or regulatory requirements and to remove any guidance that is applicable only to VA's internal operating processes or procedures. Codified acquisition regulations may be amended and revised only through formal rulemaking under the Office of Federal Procurement Policy Act. This proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. This proposed rule will generally be small business neutral. VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined this rule is not a significant regulatory action.

Discussion and Analysis

VA proposes to make the following changes to the VAAR in this phase of its revision and streamlining initiative. For procedural guidance cited below that is proposed to be

deleted from the VAAR, each section cited for removal is being considered for inclusion in VA's internal agency operating procedures in accordance with FAR 1.301(a)(2). Similarly, delegations of authorities that are removed from the VAAR will be included in the VA Acquisition Manual (VAAM) as internal agency guidance.

We propose to revise the main parts reflected in the title of the case: VAAR parts 803, 814, and 822, as well as revisions to affected parts as a result of those changes: VAAR parts 801, 802, 812, and 852.

We propose to revise the authority citations under Parts 801, 802, 803, 812, 814, 822, and 852 to include a reference to 41 U.S.C. 1121(c)(3) which is from Title 41, Public Contracts, Positive Law codification that speaks to the authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement that are subject to the authority conferred in the cited section, as well as other sections of Title 41 as shown therein. Any other proposed changes to authorities are shown under the individual parts below.

VAAR Part 801—Department of Veterans Affairs Acquisition Regulation System

This proposed rule removes an information collection burden previously included in the VAAR based on an outdated practice in providing bid envelopes. In section 801.106, OMB approval under the Paperwork Reduction Act, we propose to remove and discontinue the Office of Management and Budget (OMB) control number 2900-0593, clause 852.214-70, as well as its prescription at 814.201-6(a), since sealed bids are solicited through the Governmentwide Point of Entry (GPE) and are largely submitted electronically rather than

through the U.S. mail, thereby making the optional practice of providing bidders with envelopes and return address label unnecessary.

VAAR Part 802—Definitions of Words and Terms

In section 802.101, Definitions, we propose to add two new definitions to define two key terms used within the revised VAAR part 803, Improper Business Practices and Personal Conflicts of Interests, dealing with debarment and suspensions and that will be applicable when referenced in the future in other VAAR parts: Debarment and Suspension Committee and Suspension and Debarring Official. These are necessary to ensure a clear understanding of the meaning of these terms and who is designated as the Suspension and Debarring Official (SDO).

VAAR Part 803—Improper Business Practices and Personal Conflicts of Interest

We propose to clarify the language regarding the prohibition of contractors from making reference in their commercial advertising regarding VA contracts to avoid implying that the Government approves or endorses products or services. We propose to add a requirement that contracting officers require contractors and subcontractors at any tier to obtain signed non-disclosure statements from covered personnel.

In subpart 803.1, Safeguards, we propose to remove and reserve the entire subpart for the reasons stated in the sections below which fall under the subpart. We propose to remove section 803.101, Standards of conduct, since it contains procedural guidance and a delegation of authority that is internal to the VA and will be in the VAAM.

We propose to remove section 803.101-3, Department regulations, since it contains information on standards of conduct and financial disclosure for VA employees and is internal procedural guidance that is internal to the VA and will be in the VAAM.

We propose to remove section 803.104, Procurement integrity, and section 803.104-7, Violations or possible violations, since they contain procedural guidance and a delegation of authority that is internal to the VA and will be in the VAAM. We propose to remove subsection 803.104-7, Violations or possible violations since it also contains procedural guidance and a delegation of authority that is internal to the VA and will be in the VAAM.

In subpart 803.2, Contractor Gratuities to Government Personnel, we are proposing to update the policy governing improper business practices and personal conflicts of interests to make the agency's policies clear, to provide notice of due process rights and to establish who in the agency determines whether or not a violation of the Gratuities clause has occurred and what procedures are followed when the Suspension and Debarring Official (SDO) makes that decision.

In section 803.204, we propose to remove portions of section 803.204, Treatment of violations, which contain procedural guidance and a delegation of authority that is internal to the VA and will be moved to the VAAM. To ensure contractors are apprised of their rights, we propose to revise section 803.204 to add the responsibility of the Suspension and Debarring Official (SDO) for determining whether or not a violation of the Gratuities clauses has occurred and what action will be taken, as well as a paragraph that states that when the SDO determines that a violation has occurred and that debarment is being considered, the SDO shall follow the requirements at VAAR 809.406-3.

In subpart 803.3, Reports of Suspected Antitrust Violations, we propose to remove section 803.303, Reporting suspected antitrust violations, since it contains guidance to VA employees that is internal to the VA and will be moved to the VAAM.

In subpart 803.4, Contingent Fees, we propose to remove and reserve the entire subpart and to remove the underlying section 803.405, Misrepresentations or violations of the Covenant Against Contingent Fees, since it contains guidance to VA employees that is internal to the VA and will be moved to the VAAM.

In subpart 803.5, Other Improper Business Practices, we propose to remove section 803.502, Subcontractor kickbacks, since it provides direction to VA employees that is internal to the VA and will be moved to the VAAM.

In section 803.570, Commercial advertising, we propose to revise the language of subsection 803.570-1, Policy, to clarify the intent to prohibit advertising that implies a Government endorsement of the contractor's products or services.

In subpart 803.6, Contracts with Government Employees or Organizations Owned or Controlled by Them, we propose to remove and reserve the entire subpart and to remove the underlying section 803.602, Exceptions, since it delegates authority to authorize an exception to the policy in FAR 3.601. This delegation will be in the VA Acquisition Manual and is internal VAAM procedural guidance.

In subpart 803.7, Voiding and Rescinding Contracts, we propose to remove and reserve the entire subpart and to remove the underlying sections. We propose to remove section 803.703, Authority, since it is a delegation of authority. This delegation will be in the VAAM and is internal VA procedural guidance. We propose to remove section

803.705, Procedures, as it duplicates FAR 3.705. A short paragraph that directs VA Heads of Contracting Activities to follow the procedures of FAR 3.705 was added to the VAAM.

In subpart 803.8, Limitation on the Payment of Funds to Influence Federal Transactions, we propose to remove and reserve the entire subpart and to remove the underlying sections. We propose to remove section 803.804, Policy, and section 803.806, Processing suspected violations. This is internal VA procedural guidance and will be moved to the VAAM.

We propose to add subpart 803.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions. This implements part of FAR clause 52.203-16, Preventing Personal Conflicts of Interest, by requiring the signing of a Non-Disclosure Agreement by certain contractor covered employees performing acquisition functions closely associated with inherently governmental functions in order to prohibit disclosure of non-public information accessed through performance on a Government contract. This also requires each contractor and subcontractor at any tier whose employees perform acquisition functions closely associated with inherently governmental functions to obtain the signed non-disclosure forms from each covered employee.

We propose to remove and reserve subpart 803.70, Contractor Responsibility to Avoid Improper Business Practices, and to remove its underlying section 803.7000, Display of the VA Hotline poster and its prescription at section 803.7001, Contract clause, because it is unnecessary and duplicates FAR coverage. FAR 52.203-14, Display of Hotline Poster(s), as prescribed at FAR 3.1004(b), provides adequate coverage for the VA. Agency internal procedures regarding fill-in information for the clause will be covered in the VAAM.

VAAR Part 812—Acquisition of Commercial Items

In section 812.301, paragraph (b)(13), we propose to change the name of provision 852.214-74 to Marking of Bid Samples to better reflect the requirement of the provision.

VAAR Part 814—Sealed Bidding

In subpart 814.1, Use of Sealed Bidding, we propose to delete the subpart in its entirety, to include its underlying sections. We propose to delete section 814.104, Types of contracts, and section 814.104-70, Fixed-price contracts with escalation, as unnecessary since both simply require compliance with FAR 16.203-1 through 16.203-4 and no additional VAAR text is required.

In subpart 814.2, Solicitation of Bids, we propose to revise section 814.201(a) – (f) by: removing paragraphs (a) – (b) since they deal with numbering of IFBs and consist of internal agency procedures which is more properly covered in VAAM subpart 804.16; and, by removing paragraphs (c) through (f) altogether under the existing section. The title of the section would remain, but no additional text is added.

We propose to add a new subsection, 814.201-2, Part I—The Schedule, to explain how award will be made on summary bids and bids on groups of items to ensure this is clear to the public. In this new subsection 814.201-2, we propose to add revised paragraphs originating from the old 814.201 to comport with FAR numbering and arrangement under the new subsection VAAR 814.201-2(b) to implement FAR 14.201-2(b).

In subsection 814.201-6, Solicitation provisions, we propose to remove as unnecessary paragraph (a), which addresses bid envelopes, since labeling of bids is a

customary and usual commercial practice, and the use of the OF 17, which is optional, is no longer a standard practice. We propose to redesignate paragraph (b) as (a) and to revise item (1) to prescribe new provision 852.214-71, Restrictions on alternate item(s); item (2) to clarify the conditions for including the provision 852.214-72, Alternate items; and item (3) to prescribe the provision 852.214-73, Alternate packaging and packing, when bids will be allowed based on different packaging and packing. We also proposed to redesignate paragraph (c) as (b) and to add a prescription for the provision 852.214-74, Marking of bid samples.

We propose to add section 814.202, General rules for solicitation of bids and subsection 814.202-4, Bid samples, requiring samples to be from the manufacturer providing supplies or services under the contract. This ensures that the products that are actually proposed and would be delivered under the contract, if awarded, are the products that are submitted for evaluation. Paragraph (g), requires that bid samples be retained for the period of contract performance or until settlement of any claim that the Government may have against the contractor. Retention is intended for inspection purposes under FAR 14.202-4(g)(4).

We propose to delete section 814.203, Methods of soliciting bids, and subsection 814.203-1, Transmittal to prospective bidders, as the practice specified of furnishing a bid envelope or sealed bid label is out of date with existing practices.

We propose to delete section 814.204, Records of Invitations for Bids and Records of Bids, as it contains internal instructions to the VA and will be moved to the VAAM.

We propose to delete section 814.208, Amendment of Invitation for Bids as out of date with existing practices regarding sending amendments.

In subpart 814.3, Submission of Bids, we propose to delete section 814.301, Responsiveness of bids, since there is no authority to refer the question of timeliness to the U.S. Government Accountability Office (GAO) except in the context of a protest.

We propose to delete section 814.302, Bid submission, as duplicative of FAR 14.302(a) and therefore unnecessary.

We propose to revise section 814.304, Submission, modification, and withdrawal of bids, to delete internal procedures, to stipulate a limited time period for a late bidder to submit evidence of timeliness, and to renumber this paragraph (f) accordingly to comport with FAR and VAAR numbering conventions.

In subpart 814.4, Opening of Bids and Award of Contract, we propose to delete the entire subpart because the information is either redundant to the FAR and is adequately covered there or it is comprised of agency internal procedures that will be incorporated into the VAAM as noted specifically below.

We propose to delete section 814.401, Receipt and safeguarding of bids, because coverage in the VAAR is unnecessary as the FAR adequately covers.

We propose to delete sections 814.402, Opening of bids; 814.403, Recording of bids; 814.404, Rejection of bids; 814.404-1, Cancellation of invitations after opening; 814.404-2, Rejection of individual bids; 814.407, Mistakes in bids; 814.407-3, Other mistakes disclosed before award; and, 814.407-4, Mistakes after award, as these are agency internal procedures that will be incorporated into the VAAM.

We propose to delete section 814.404-70, Questions involving the responsiveness of a bid, as there is no authority to refer questions of bid responsiveness to the GAO other than in the context of a protest, and, the overall responsibility for this determination rests

with the contracting officer. Coverage in FAR 14.301, Responsiveness of bids, is adequate and no further VAAR coverage is required.

We propose to delete sections 814.408, Award, and 814.408-70, Award when only one bid is received, because coverage in the VAAR is unnecessary as it is adequately covered by FAR 14.408-1(b).

We propose to delete section 814.408-71, Recommendation for award (construction) as the procedures are no longer in use within the Office of Construction and Facilities Management.

We propose to delete section 814.409, Information to bidders, as unnecessary since the requirement not to disclose is contained in FAR part 3 and need not be duplicated in the VAAR.

VAAR Part 822—Application of Labor Laws to Government Acquisitions

In subpart 822.3, Contract Work Hours and Safety Standards Act, we propose to revise section 822.304, Variations, tolerances, and exemptions, to use plain language to state the conditions that must be met to permit use of the variation to Contract Work Hours and Safety Standards (the statute) (historically known as the Contract Work Hours and Safety Standards Act), granted by the Secretary of Labor regarding the payment of overtime under contracts for nursing home care for Veterans.

We propose to revise section 822.305, Contract clause, to change the title of the clause at 852.222-70 to Contract Work Hours and Safety Standards—Nursing Home Care

for Veterans in order to reflect the way the FAR refers to the historical titles based on the Positive Law codification.

In subpart 822.4, Labor Standards for Contracts Involving Construction, we propose to remove and reserve subpart 822.4, Labor Standards for Contracts Involving Construction, since this subpart contains procedural guidance on the types of labor standards involved in construction contracting, internal agency guidance to the contracting officer, etc., and is more appropriate for inclusion in the VAAM.

We propose to remove the underlying section 822.406, Administration and enforcement and subsection 822.406-11, Contract terminations, which falls under this subpart since it contains procedural guidance and will be moved to the VAAM.

VAAR Part 852—Solicitation Provisions and Contract Clauses

In subpart 852.2, we propose to revise clause 852.203-70, Commercial Advertising, to use plain language, remove gender-specific wording, and to clarify the intent to prohibit advertising that implies a Government endorsement of the contractor's products or services.

We propose to remove clause 852.203-71, Display of Department of Veterans Affairs Hotline Poster, because the VA will instead use FAR clause 52.203-14, Display of Hotline Poster(s), as prescribed at FAR 3.1004. The FAR clause permits insertion of fill-in language to identify an agency's hotline poster and VA will include language in its internal agency procedures detailing the requirement to insert the information regarding its agency specific hotline poster.

We propose to remove provision 852.214-70, Caution to Bidders - Bid Envelopes, because the practices described within the provision are obsolete with the advent of posting on the Government wide point of entry (GPE) via the Federal Business Opportunities (FEDBIZOPPS.gov or FBO.gov) web page or via a linked interface off of FBO.gov. VA no longer issues Bid Envelopes or the Optional Form (OF) 17, Sealed Bid Label, described in the provision, when electronically posting IFBs, thus making the provision obsolete and unnecessary. Additionally, the clause, which talks to the VA providing a Sealed Bid Label, is unnecessary since labeling a bid is a customary and usual business practice making it unnecessary for VA to provide an optional label.

We propose to revise the individual prescription references for the following clauses based on the restructuring of 814.201-6: 852.214-71, Restrictions on Alternate Item(s); 852.214-72, Alternate Item(s); and 852.214-73, Alternate Packaging and Packing.

We propose to revise the title, text and prescription language of provision 852.214-74 that now reads, Bid Samples, to Marking of Bid Samples to describe better what the provision is about and to distinguish it from a FAR provision that is called "Bid Samples." We use plain language to describe the principal purpose, which is to ensure that bidder's packages that include bid samples are clearly marked and identified with the words Bid Samples, as well as complete lettering/numbering and description of the related bid item(s), the number of the IFB, and the name of the bidder submitting the bid samples. We are also removing language stating that the preparation and transportation of the bid sample must be prepaid by the bidder as this language is unnecessary because FAR clause 52.214-20, Bid Samples, already contains language covering the bidder's responsibilities in this

regard. We also propose to revise the prescription language for this provision at 814.201-6(b) which was renumbered to comport with FAR and VAAR numbering and arrangement.

We propose to revise clause 852.222-70, Contract Work-Hours and Safety Standards Act – Nursing Home Care Contract Supplement, to change the title to Contract Work Hours and Safety Standards—Nursing Home Care for Veterans, to better reflect the substance and coverage of the clause and to align the name of the clause with the revised current reference in lieu of the historical title of the act. This revision will also clarify that the clause has flow-down requirements and applies to subcontractors at any tier when the stated conditions in the VAAR clause are met.

Effect of Rulemaking

Title 48, Federal Acquisition Regulations System, Chapter 8, Department of Veterans Affairs, of the Code of Federal Regulations, as revised by this proposed rulemaking, represents VA's implementation of its legal authority and publication of the Department of Veterans Affairs Acquisition Regulation (VAAR) for the cited applicable parts. Other than future amendments to this rule or governing statutes for the cited applicable parts, or as otherwise authorized by approved deviations or waivers in accordance with FAR subpart 1.4, Deviations from the FAR, and as implemented by VAAR subpart 801.4, Deviations from the FAR or VAAR, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with the rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking as pertains to the cited applicable VAAR parts.

Executive Orders 12866 and 13563

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 12866, Regulatory Planning and Review defines "significant regulatory action" to mean any regulatory action that is likely to result in a rule that may: "(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined this rule is not a significant regulatory action under E.O. 12866.

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on

VA's Web site at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 Through Fiscal Year to Date.

Paperwork Reduction Act

Although this action contains provisions constituting collections of information at 48 CFR 814.201-6(a) and 852.214-70, under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or proposed revised collections of information are associated with this proposed rule. The information collection requirements for §§ 48 CFR 814.201-6(a) and 852.214-70 are currently approved by the Office of Management and Budget (OMB), have been assigned OMB control number 2900-0593, and are being proposed for removal and discontinuance.

Regulatory Flexibility Act.

This proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule will generally be small business neutral. The overall impact of the proposed rule will be of benefit to small businesses owned by Veterans or service-disabled Veterans as the VAAR is being updated to remove extraneous procedural information that applies only to VA's internal operating procedures. VA estimates no cost impact to individual business resulting from these rule updates. On this basis, the adoption of this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory

flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule will have no such effect on State, local, and tribal Governments or on the private sector.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on May 1, 2017. for publication.

List of Subjects

48 CFR Part 801

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 802

Government procurement.

48 CFR Part 803

Antitrust, Conflict of interest, Government procurement.

48 CFR Part 812

Government procurement.

48 CFR Part 814

Government procurement.

48 CFR Part 822

Government procurement, Labor.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Dated: May 2, 2017.

Janet Coleman,
Chief,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 48 CFR, chapter 8, parts 801, 802, 803, 812, 814, 822, and 852 as follows:

PART 801—DEPARTMENT OF VETERANS AFFAIRS ACQUISITION REGULATION
SYSTEM

1. The authority citation for part 801 is revised to read as follows:

Authority: 38 U.S.C. 501; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); and 48 CFR 1.301-1.304.

801.106 OMB approval under the Paperwork Reduction Act.

2. In section 801.106, table columns titled “48 CFR part or section where identified and described” and “Current OMB Control Number,” are amended to remove the references to section 852.214-70 and the corresponding OMB Control Number 2900-0593.

Part 802—DEFINITIONS OF WORDS AND TERMS

3. The authority citation for part 802 is revised to read as follows:

Authority: 38 U.S.C. 501; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); and 48 CFR 1.301-1.304.

802.101 Definitions

4. Section 802.101 is amended to add the following definition in alphabetical order after “D&S Committee” to read as follows:

* * *

Debarment and Suspension Committee means a committee authorized by the debarring official to assist the debarring official with debarment and suspension related matters. The Debarment and Suspension Committee is also referred to as the D&S Committee.

* * *

5. Section 802.101 is amended to add the following definition in alphabetical order after “Suspending Official” to read as follows:

* * *

Suspension and debarring official means the Senior Procurement Executive (SPE) or Deputy Senior Procurement Executive (DSPE) if further delegated in writing by the SPE. The Suspension and Debarring Official is also referred to as the SDO.

* * * * *

PART 803—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

6. The authority citation for part 803 is revised to read as follows:
Authority: 38 U.S.C. 501; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); and 48 CFR 1.301-1.304.

Subpart 803.1 [Removed and Reserved]

7. Subpart 803.1 is removed and reserved.

803.204 [Amended]

8. Section 803.204 is revised to read as follows:

803.204 Treatment of violations.

(a) The SDO shall determine whether or not a violation of the Gratuities clause, 52.203-3 has occurred and what action will be taken under FAR 3.204(c).

(c) When the SDO determines that a violation has occurred and that debarment is being considered, he or she shall follow procedures at 809.406-3.

Subpart 803.3 [Removed and Reserved]

9. Subpart 803.3 is removed and reserved.

Subpart 803.4 [Removed and Reserved]

10. Subpart 803.4 is removed and reserved.

803.502 [Removed]

11. Section 803.502 is removed.

803.570 [Amended]

12. Section 803.570-1 is revised to read as follows:

803.570-1 Policy.

VA policy prohibits contractors from making references in its commercial advertising to VA contracts in a manner that states or implies the Government approves or endorses the product or service or considers it superior to other products or services. The intent of this policy is to preclude the appearance of bias toward any product or service.

Subpart 803.6 [Removed and Reserved]

13. Subpart 803.6 is removed and reserved.

Subpart 803.7 [Removed and Reserved]

14. Subpart 803.7 is removed and reserved.

Subpart 803.8 [Removed and Reserved]

15. Subpart 803.8 is removed and reserved.

Subpart 803.11 [Added]

16. Subpart 803.11 is added to read as follows:

Subpart 803.11—Preventing Personal Conflicts of Interest for Contractor Employees
Performing Acquisition Functions

803.1103 Procedures.

(a) By use of the contract clause at 52.203-16, Preventing Personal Conflicts of Interest, the contracting officer shall require each contractor whose employees perform acquisition functions closely associated with inherently Governmental functions to obtain from each covered employee a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract. See FAR 3.1103(a)(2)(iii).

Subpart 803.70 [Removed and Reserved]

17. Subpart 803.70 is removed and reserved.

PART 812—ACQUISITION OF COMMERCIAL ITEMS

18. The authority citation for part 812 is revised to read as follows:

Authority: 38 U.S.C. 501; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); and 48 CFR 1.301-1.304.

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812.301 [Amended]

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19. Section 812.301, paragraph (b)(13) is revise to read as follows:

812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

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(b) * * *

(13) 852.214-74, Marking of Bid Samples.

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PART 814—SEALED BIDDING

20. The authority citation for part 814 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); and 48 CFR 1.301-1.304.

Subpart 814.1 [Removed and Reserved]

21. Subpart 814.1 is removed and reserved.

814.201 [Removed and reserved]

22. Section 814.201 is removed and reserved.

23. Subsection 814.201-2 is added to read as follows:

814.201-2 Part I—The Schedule.

(b) Section B, Supplies or services and prices.

(1) When the contracting officer determines that it will be to the Government's advantage to make an award on the basis of a summary bid, the IFB shall include the following statement in Part I - The Schedule, Section B:

The award will be made on either the bid price for individual items or the summary bid price summary for all items, whichever results in the lowest price to the Government.

Therefore, to assure proper evaluation of all bids, a bidder quoting a summary bid price must also quote a price on each individual item included in the summary bid price.

(2) When a contracting officer determines that it will be to the Government's advantage to make an award by group or groups of items, the IFB shall include the following statement in Part I - The Schedule, Section B:

Award shall be made on the basis of the bid price for each identified group of items. The individual price of each line item in the group does not have to be the lowest bid received for that item. This may apply when the items in the group or groups are readily available from sources to be solicited; and one of the following applies-

(i) Furniture or fixtures are required for a single project and uniformity of design is desirable.

(ii) The articles required will be assembled and used as a unit.

* * * * *

24. Subsection 814.201-6 is added to read as follows:

814.201-6 Solicitation provisions.

(a) In an invitation for bid for supplies, equipment, or services (other than construction), the contracting officer shall define the extent to which VA will authorize and consider alternate bids.

(1) The contracting officer shall include the provision at 852.214-71, Restrictions on Alternate Items(s), in the invitation when VA will consider an alternate item only where acceptable bids on a desired item are not received or the bids do not satisfy the total requirement. (For construction projects, VA will consider for acceptance an alternate specified only as a part of the basic item.)

(2) The contracting officer shall include the provision at 852.214-72, Alternate Items, in the invitation, when VA will consider an alternate item on an equal basis with the item specified. (For construction projects, VA will consider for acceptance an alternate specified only as a part of the basic item.)

(3) In addition to either of the provisions referenced in paragraphs (b)(1) or (2) of this subsection, the contracting officer shall include the provision at 852.214-73, Alternate Packaging and Packing, in the invitation when bids will be allowed based on different packaging, unit designation, etc.

(b) The contracting officer shall include the provision at 852.214-74, Marking of Bid Samples, in the invitation, along with the provision at FAR 52.214-20, Bid Samples, when the contracting officer determines that samples are necessary to the proper awarding of a contract.

25. Subpart 814.2 is amended to add section 814.202 and subsection 814.202-4, to read as follows:

814.202 General rules for solicitation of bids.

814.202-4 Bid samples.

(a) Policy. When bid samples are required, the contracting officer shall include a notice in the contract Schedule that requires bidders to submit samples produced by the manufacturer whose products will be supplied under the contract.

(g) Handling bid samples.

(1) Samples from successful bids shall be retained for the period of contract performance.

(2) If the contracting officer anticipates a claim regarding the contract, the contracting officer shall require that the bid samples be retained until the claim is resolved. If there are no outstanding claims regarding the contract, the contracting officer may authorize disposal of the samples at the end of the contract term in accordance with the bidder's instructions.

(3) The contracting officer shall require that samples from unsuccessful bids be retained until award. After award, these samples may be disposed of in accordance with the bidder's instructions.

814.203 [Removed]

26. Section 814.203 is removed.

814.204 [Removed]

27. Section 814.204 is removed.

814.208 [Removed]

28. Section 814.208 is removed.

814.301 [Removed]

29. Section 814.301 is removed.

814.302 [Removed]

30. Section 814.302 is removed.

31. Section 814.304 is amended by removing paragraphs (a) and (b) and adding paragraph (f) to read as follows:

814.304 Submission, modification and withdrawal of bids.

* * * * *

(f) A notification to late bidders shall specify the final date by which VA must receive evidence of timeliness. This date shall be within five calendar days of the date an electronic notice is sent to the bidder, or within ten calendar days of receipt by the bidder of a notice sent by other than electronic means.

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Subpart 814.4 [Removed and Reserved]

32. Subpart 814.4 is removed and reserved.

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PART 822—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

33. The authority citation for part 822 is revised to read as follows:

Authority: 29 CFR 5.15(d); 38 U.S.C. 501; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); and 48 CFR 1.301-1.304.

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PART 822—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 822.3—Contract Work Hours and Safety Standards Act

Sec.

822.304 Variations, tolerances, and exemptions.

822.305 Contract clause.

822.304 [Amended]

34. Section 822.304 is revised to read as follows:

822.304 Variations, tolerances, and exemptions.

For contracts providing nursing home care for veterans, the Secretary of Labor has allowed a variation to the requirements of Contract Work Hours and Safety Standards (the statute) (40 U.S.C. 3701, *et seq.*) regarding the payment of overtime (see 29 CFR 5.15(d)(2)). The variation provides that overtime may be calculated on a basis other than a 40 hour workweek (as an alternate work period) when—

(a) Due to operational necessity or convenience a work period of 14 consecutive days may be accepted in lieu of the workweek of 7 consecutive days for the purpose of computing overtime compensation, pursuant to an agreement or understanding arrived at between the contractor and the contractors' employees before performance of the work; and

(b) If the contractor's employees receive compensation for employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period at a rate not less

than 1 1/2 times the regular rate at which the individual is employed, computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended.

822.305 [Amended]

35. Section 822.305 is revised to read as follows:

822.305 Contract clause.

The contracting officer shall insert the clause at 852.222-70, Contract Work Hours and Safety Standards—Nursing Home Care for Veterans, in solicitations and contracts for nursing home care for veterans. The contractor shall flow down this clause and insert in in all subcontracts, at any tier.

Subpart 822.4 [Removed and Reserved]

36. Subpart 822.4 is removed and reserved.

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PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

37. The authority citation for part 852 is revised to read as follows:

Authority: 38 U.S.C. 501, 8127-8128, and 8151-8153; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); and 48 CFR 1.301-1.304.

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Subpart 852.2—Texts of Provisions and Clauses

852.203-70 [Amended]

38. Section 852.203-70 is revised to read as follows:

852.203-70 Commercial Advertising.

As prescribed in 803.570-2, insert the following clause:

COMMERCIAL ADVERTISING (DATE)

The contractor shall not make reference in its commercial advertising to Department of Veterans Affairs contracts in a manner that states or implies the Department of Veterans Affairs approves or endorses the contractor's products or services or considers the contractor's products or services superior to other products or services.

(End of clause)

852.203-71 [Removed and Reserved]

39. Section 852.203-71 is removed and reserved.

* * * * *

852.214-70 [Removed and Reserved]

40. Section 852.214-70 is removed and reserved.

852.214-71 [Amended]

41. Section 852.214-71 is revised to read as follows:

852.214-71 Restrictions on alternate item(s).

As prescribed in paragraph 814.201-6(a)(1), insert the following provision:

RESTRICTIONS ON ALTERNATE ITEM(S) (DATE)

Bids on []* will be considered only if acceptable bids on []** are not received or do not satisfy the total requirement.

*Contracting officer will insert an alternate item that is considered acceptable.

**Contracting officer will insert the required item and item number.

(End of provision)

852.214-72 [Amended]

42. Section 852.214-72 is revised to read as follows:

852.214-72 Alternate item(s).

As prescribed in paragraph 814.201-6(a)(2), insert the following provision:

ALTERNATE ITEM(S) (DATE)

Bids on []* will be given equal consideration along with bids on []** and any such bids received may be accepted if to the advantage of the Government. Tie bids will be decided in favor of [].**

*Contracting officer will insert an alternate item that is considered acceptable.

**Contracting officer will insert the required item and item number.

(End of provision)

852.214-73 [Amended]

43. Section 852.214-73 is revised to read as follows:

852.214-73 Alternate packaging and packing.

As prescribed in paragraph 814-201-6(a)(3), insert the following provision:

ALTERNATE PACKAGING AND PACKING (DATE)

The bidders offer must clearly indicate the quantity, package size, unit, or other different

feature upon which the quote is made. Evaluation of the alternate or multiple alternates will be made on a common denominator such as per ounce, per pound, etc., basis.

(End of provision)

852.214-74 [Amended]

44. Section 852.214-74 is revised to read as follows:

852.214-74 Marking of Bid Samples.

As prescribed in paragraph 814.201-6(b), insert the following provision:

MARKING OF BID SAMPLES (DATE)

Any bid sample(s) furnished must be in the quantities specified in the solicitation. Cases or packages must be plainly marked 'Bid Sample(s)' with the complete lettering/numbering and description of the related bid item(s), the number of the Invitation for Bids, and the name of the bidder submitting the bid sample(s).

(End of provision)

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852.222-70 [AMENDED]

45. Section 852.222-70 is revised to read as follows:

852.222-70 Contract Work-Hours and Safety Standards—Nursing Home Care for Veterans.

As prescribed in 822.305, insert the following clause:

CONTRACT WORK HOURS AND SAFETY STANDARDS—NURSING HOME CARE FOR VETERANS (DATE)

(a) No Contractor and subcontractor under this contract shall prohibit the payment of overtime wages to their employees for work in excess of 40 hours in any workweek,

which would otherwise be a violation of Contract Work Hours and Safety Standards (the statute) ([40 U.S.C. 3701, et seq.](#)), provided—

- (1) The Contractor or subcontractor is primarily engaged in the care of nursing home patients residing on the contractor's or subcontractor's premises;
- (2) There is an agreement or understanding between the Contractor or subcontractor and their employees, before performance of work, that a work period of 14 consecutive days is acceptable in lieu of a work period of 7 consecutive days for the purpose of overtime compensation;
- (3) Employees receive overtime compensation at a rate no less than 1 1/2 times the employees' regular hourly rate of pay for work in excess of 80 hours in any 14 day period; and
- (4) Pay is otherwise computed in accordance with the requirements of [the Fair Labor Standards Act of 1938, as amended](#).

(b) Subcontracts. The Contractor shall insert the text of this clause, including this paragraph (b), in subcontracts at any tier. The Contractor shall be responsible for compliance by any subcontractor or lower-tier subcontractor with the provisions set forth in paragraphs (a) through (b) of this clause.

(End of clause)

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